UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BANKERS ASSOCIATION et al., Plaintiffs, v. NATIONAL CREDIT UNION ADMINISTRATION, et al., Defendants,	No. 96-CV-2312 (TPJ) Consolidated with No. 90-CV-2948 (TPJ)

DEFENDANT NCUA'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

On October 9, 1996, a hearing was held on plaintiffs' motions for a temporary restraining order and preliminary injunction. The Court stated at the conclusion of the hearing that the record would be held open for ten days. Accordingly, defendant National Credit Union Administration (NCUA) submits this supplemental memorandum to address various issues and questions raised at the hearing and to clarify NCUA's position in this important case.[1]

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[1] NCUA's petition for rehearing and suggestion for rehearing *en banc* in the consolidated *First National* case was denied by the D.C. Circuit on October 23, 1996. This action does not affect the arguments against preliminary injunctive relief made here or in NCUA's prior memorandum.

I. PLAINTIFFS' CLAIM FOR RELIEF IS BARRED BY LACHES.

Three basic questions were raised at the hearing concerning NCUA's laches argument: (1) Was the defense waived or otherwise foreclosed in the consolidated First National Bank & Trust case? (2) Can laches bar recovery on a statutory claim? (3) Is the Heimann case distinguishable? NCUA addresses each of these questions in turn.

A. The Laches Defense Asserted Here Is Not Foreclosed By First National, Which Did Not Involve A Facial Challenge To NCUA's Multiple Group Policy.

In its motion for summary judgment filed in First National, NCUA alerted Judge Pratt to the possibility of a laches defense if plaintiffs prevailed on the merits:

> [B]ecause plaintiffs seek equitable relief, further briefing would be required to determine whether such relief is barred by the doctrine of laches as plaintiffs waited more than eight years after the select-group policy was first implemented to file this lawsuit. See, e.g., Independent Bankers Ass'n of Am. v. Heimann, 627 F.2d 486, 488 (D.C. Cir. 1980) (per curiam).

Memorandum In Support Of NCUA's Renewed Motion For Summary Judgment (filed February 4, 1994) at 45 n.93.

In response, plaintiffs stated that the laches issue was "irrelevant," because they were not challenging the select-group (or "multiple group") policy on its face, but rather its recent application to AT&T Federal Credit Union (ATTF):

> The NCUA's allusion in a footnote to the doctrine of laches is a red herring. While the NCUA correctly counts that the plaintiffs filed their complaint more than eight years after the select-group policy was first implemented, this time period is irrelevant. Plaintiffs are challenging NCUA's actions since November 14, 1989 in repeatedly permitting AT&T Credit to extend membership to persons who do not share a common bond. . . . . Declaring these actions null and void and preventing similar ones in the future is the relief that the Plaintiffs seek.

Plaintiffs' Memorandum In Opposition To Defendants' Motions For Summary Judgment (filed February 18, 1994 in C.A. No. 90-2948) at 26 n.20.

After Judge Pratt ruled in favor of NCUA, there was no reason for either side to further argue laches, either in this court or the Court of Appeals, and therefore neither court ever addressed it.

However, NCUA did raise the defense in a related case before Judge Pratt, Texas Bankers Association v. NCUA, 888 F. Supp. 184 (D.D.C. 1995), involving a challenge to the addition of a senior citizen association to a Texas credit union pursuant to NCUA's "senior citizen/retiree" policy.[2] Judge Pratt held that the

[2] The plaintiffs in Texas Bankers -- two Texas banking associations and five Texas banks -- also challenged the addition of seven occupational groups to the same credit union under the multiple group policy. Judge Pratt rejected those claims,

challenged membership expansion violated the Federal Credit Union Act's "common bond" provision. Id. at 191. He then rejected NCUA's alternative argument that the claim was barred by laches, because plaintiffs were challenging a recent application of the policy, not the policy itself:

> We need not decide whether plaintiffs could directly attack the "senior citizen/retiree policy" so many years after it was promulgated. **Plaintiffs do not mount a direct challenge on the policy rules themselves, but on their implementation in this case.**

Id. (emphasis added).

The same was true of the claims in First National. As in Texas Bankers, the plaintiffs in First National challenged the application of the multiple group policy to a single credit union, ATTF, not the policy itself. Therefore, under Judge Pratt's reasoning in Texas Bankers, laches would not have barred the claims in First National. As noted above, plaintiffs themselves characterized the eight-year delay between the adoption of the policy in 1982 and the filing of that case in 1990 as "irrelevant," because they were not challenging the policy on its face.

Now, fourteen years since the adoption of NCUA's multiple group policy, and after more than 3500 federal credit unions have

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consistent with his earlier ruling in First Federal, and plaintiffs appealed. That appeal is still pending.

added approximately 157,000 employee groups under the policy, the policy is being challenged for the first time in this new case filed by three bank associations. Because it did not involve a facial challenge, First National poses absolutely no obstacle to either NCUA's ability to raise a laches defense here, or the Court's ability to decide the issue. Plaintiffs' lengthy and inexcusable delay in making this claim cannot be characterized as "irrelevant," any more than the 12-year delay of plaintiff Independent Bankers' Association of America in IBAA v. Heimann, 627 F.2d 487 (D.C. Cir. 1980), was irrelevant.

B. Laches Applies To Statutory Claims.

The Court inquired during the October 9 hearing whether laches could bar relief on an otherwise meritorious statutory claim. As Heimann makes clear, the answer is yes.

At issue in Heimann was the National Bank Act's definition of a bank "branch," 12 U.S.C. 36(f), and the validity of the Comptroller of the Currency's interpretive ruling that this definition does not encompass loan production offices (LPOs) opened by national banks. The district court held that the Comptroller's policy of allowing LPOs to be operated as non-bank branches, not subject to state regulation, was inconsistent with the statutory definition. It ordered the Comptroller to rescind the policy and refrain from further implementation of it. See 627 F.2d at 487.

The D.C. Circuit reversed without even resolving the underlying statutory claim, holding that "the district court abused its discretion in not ruling that laches barred [plaintiff's] request for relief." 627 F.2d at 488. The Court did not decide the underlying statutory issue, because it did not need to; laches bars claims for equitable relief that are "otherwise meritorious." Id. at 488

That the claim in Heimann was founded upon a federal statute thus did not prevent it from being barred by laches. By the same token, the statutory nature of plaintiffs' claim here also does not preclude application of laches. Just as laches barred IBAA from enforcing a statutory right against unlawful competition by national banks in Heimann, so does it bar IBAA and its co-plaintiffs here from enforcing a statutory right (as determined by the D.C. Circuit) against unlawful competition by federal credit unions. See also Stone v. Williams, 873 F.2d 620 (2d Cir. 1989) (claim asserting statutory right under the Copyright Acts of 1909 and 1976 barred by laches); National Association of Life Underwriters v. Clarke, 736 F. Supp. 1162, 1165 n.11 (D.D.C. 1990), (challenge to Comptroller of the Currency's interpretation of the National Bank Act, "even if meritorious, is barred by laches") (citing Heimann), aff'd, 997 F.2d 958 (D.C. Cir. 1993).

This does not mean that future approvals by NCUA of multiple group expansions cannot be challenged at all. The Court of

Appeals in Heimann explicitly distinguished between IBAA's facial challenge to the policy, which was barred by laches, and claims by "individual" banks (including IBAA members) alleging unlawful competition by "particular" loan production offices, which could go forward. 627 F.2d at 489 fn. An example of such a claim is First National: a particularized challenge by individual North Carolina banks to recent NCUA approvals of a single credit union's multiple group expansions. Such claims, as the Court of Appeals suggested in Heimann, and Judge Pratt explicitly held in Texas Bankers, are not barred by laches.[3]

C. **Heimann Is Indistinguishable.**

In a short, per curiam decision, the D.C. Circuit concluded easily in Heimann that laches barred IBAA's challenge to the Comptroller's interpretive policy because of (1) IBAA's unreasonable twelve-year delay in commencing the action, and (2) the resulting prejudice to national banks, which had, in the interim, invested substantial resources opening LPOs in reliance upon the Comptroller's policy.

The present case is factually indistinguishable from Heimann. First, plaintiffs unreasonably waited 14 years to bring this action. They could have challenged the multiple group

[3] Nor could all such claims be brought in the District of Columbia. See Part II, infra.

policy when it was adopted in 1982, as it was a "final agency action" reviewable under the Administrative Procedure Act, 5 U.S.C. § 704, and its implementation was imminent at that time. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 n.2 (1992). As the Court of Appeals stated in Heimann with regard to plaintiff IBAA, the banking associations are "charged by [their] members with anticipating the impact of government rulings in the banking area." 627 F.2d at 488.

Second, as a result of plaintiffs' delay in challenging the policy, it cannot now be invalidated without seriously threatening the stability, and even the very existence, of many of the 3,586 federal credit unions containing multiple groups that have invested much of their assets and staked their future growth in reliance upon the policy. This potential harm to federal credit unions is far **greater** than the injury faced by the national banks in Heimann -- increased charges to their customers from closing LPOs, "a result hardly in line with the public interest." 627 F.2d at 488. Not only would injunctive relief here result in increased costs to credit union customers, in the form of higher interest for consumer loans and lower interest paid on deposits,[4] it would also likely lead to failures of

[4] See Affidavit of Bill Hampel (Exhibit 1 to Intervenors' Opposition To Plaintiffs' Motion For A Temporary Restraining Order) ¶ 10.

entire institutions and corresponding losses to the National Credit Union Share Insurance Fund. See Second Declaration of David M. Marquis (filed October 9, 1996) ¶¶ 7-9; Declaration of Timothy P. Hornbrook, Associate Regional Director for Programs (filed October 9, 1996).

The Court suggested at the October 9 hearing that Heimann was the "reverse" of the present case, in that the Court of Appeals there ruled on laches without deciding the underlying merits, whereas here the Court of Appeals has decided the merits and did not rule on laches. This is a mere procedural distinction, however, that does not make the substantive reasoning of Heimann any less applicable. The "reversal" lies in the fact that the district court in Heimann ruled against the government on the underlying statutory issue, then proceeded to reject the government's laches argument and award relief, making laches an appealable issue. In contrast, Judge Pratt ruled in favor of the government on the statutory issue in First National, so he never addressed laches, and neither did the Court of Appeals. Moreover, as discussed in Part I.A. above, First National did not present a facial challenge to the multiple group policy, so the laches issue would not have been the same, even had it been addressed.

Plaintiffs' counsel sought to distinguish Heimann at oral argument on the ground that national banks do not need the

Comptroller's approval to open loan production offices, whereas NCUA approval is generally required for credit unions to add new groups under the multiple group policy. However, this distinction is not relevant. There is no reason to think that the Court of Appeals' analysis in Heimann would have been any different had the Comptroller required banks to obtain its approval before opening LPOs. Heimann, like the present case, involved a facial challenge to an agency's longstanding interpretive policy. The particular manner in which the policy is implemented -- regardless of whether or not it involves agency participation -- has no bearing on whether plaintiffs delayed unreasonably in challenging the policy on its face.[5]

II. ANY INJUNCTION ISSUED BY THE COURT SHOULD BE LIMITED TO THE D.C. CIRCUIT.

At the October 9 hearing, the Court raised the possibility of issuing an injunction that would apply everywhere except the Sixth Circuit, where a district court has upheld the NCUA's

[5] Indeed, NCUA's "streamlined expansion procedure" permits approved credit unions to add small employee groups to their fields of membership without NCUA approval of each group being added. Plaintiffs seek to enjoin the addition of new groups

multiple group policy. First City Bank v. NCUA, 897 F. Supp. 1042 (M.D. Tenn. 1995).[6] However, the more appropriate and customary way of avoiding a conflict with other courts would be for the Court to limit any injunctive relief to the D.C. Circuit.

This would enable other courts besides the D.C. and Sixth Circuits to consider the validity of NCUA's multiple group policy and possibly reach a contrary conclusion. As the D.C. Circuit has explained:

> When [an agency's] position is rejected in one circuit, . . . it should have a reasonable opportunity to persuade other circuits to reach a contrary conclusion. And there is an additional value to letting important legal issues "percolate" throughout the judicial system, so the Supreme Court can have the benefit of different circuit court opinions on the same subject.

Johnson v. U.S. Railroad Retirement Bd, 969 F.2d 1082, 1093 (D.C. Cir. 1992).[7] The Court therefore should limit any injunctive

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under this procedure, in addition to those added pursuant to NCUA's specific approval.

[6] The Sixth Circuit heard argument in the appeal of this case on October 15, 1996.

[7] Johnson does not stand for the proposition that an agency should be able to litigate its position in every Circuit in the country. Indeed, with the Railroad Retirement Board's position having been rejected by three Circuits, the Court stated that "it is time for the Board to smell the coffee." Id. In a concurring opinion, however, Judge Buckley stated, "If an agency is confident of its own position, I would be reluctant to establish an arbitrary limit on the intercircuit waters it would be allowed to test." Id. at 1097-98 (Buckley, J., concurring in part and dissenting in part).

relief to the D.C. Circuit, so that NCUA may "have a reasonable opportunity to persuade other circuits to reach a contrary conclusion."

Plaintiffs' counsel argued at the hearing that there was no practical difference between a nationwide injunction and one limited to this Circuit, because all future actions by individual banks challenging NCUA's approval of credit union charter amendments could be brought in this district. However, that position is inconsistent with the applicable venue statute, 28 U.S.C. § 1391(e). Section 1391(e) provides that an action against a United States agency may be brought in the district where (1) the defendant resides; (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) where the plaintiff resides if no real property is involved.

Most future challenges to NCUA approvals under the multiple group policy could not be brought in the District of Columbia under § 1391(e). First, although NCUA was headquartered in the District when the First National case was filed in 1990, it now resides in Alexandria, Virginia.[8] Second, NCUA's approvals of

[8] The Court noted at the hearing that the Department of Defense has been held subject to suit in the District of Columbia, even thought the Pentagon is in Virginia. Government counsel is aware of three cases holding that venue was proper

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here in actions against the Defense Department. All three cases are distinguishable.

In Mundy v. Weinberger, 554 F. Supp. 811 (D.D.C. 1983), venue was upheld because the Court of Military Appeals, where the plaintiff worked, was located in D.C. The challenged decision affecting the plaintiff was made in the Pentagon, but the court distinguished that decision aimed at an individual plaintiff working in the District from the formulation of a general policy that might affect "scores of persons." 554 F. Supp. at 818. The court noted the Pentagon's proximity to D.C. and its use of a Washington, D.C. mailing address. It stated, however:

> That is not to say that all activities occurring in any U.S. government office located near the District of Columbia may give rise to venue in this District. Suffice it to say that the Pentagon is hardly "any" federal office. Here, the plaintiff's grievance and the acts that gave rise to it are inextricably bound up with the District of Columbia in its role as the nation's capital.

Id. In contrast, future actions by individual banks would not be "inextricably bound up with the District of Columbia." Unless the plaintiff bank or the affected credit union were headquartered here, there would be no nexus to this district at all.

In Bartman v. Cheney, 827 F. Supp. 1 (D.D.C. 1993), venue in D.C. was found appropriate on the ground that the Secretary of Defense performed a "significant amount" of his duties here, given that he maintained two offices in the District and was a member of the President's Cabinet and National Security Council. Similarly, in Smith v. Dalton, 927 F. Supp. 1 (D.D.C. 1996), the Secretary of Navy was held subject to suit in this district because he maintains offices here and is actively involved in dealings with Congressional Committees and District of Columbia agencies.

NCUA does not have such extensive connections to this district. Neither NCUA nor its governing Board maintain offices here. Although the Board occasionally testifies before Congress, it is not part of the Cabinet, the National Security Counsel, or any similar entity. The Board and NCUA perform substantially all of their official duties outside the District of Columbia.

charter amendments will occur either at NCUA headquarters in Virginia or at its regional offices, none of which are located in the District. Third, the plaintiff banks in future actions would not reside in the District, except for those few that might be headquartered here.

Thus, limiting injunctive relief to the D.C. Circuit will not result in a flood of lawsuits being filed here, and it will give NCUA the opportunity to try to persuade other Circuits of the correctness of its position. This furthers the "percolation" of important legal issues that the D.C. Circuit approved in Johnson.

III. ANY PRELIMINARY INJUNCTION ISSUED BY THE COURT SHOULD BE NARROWLY AND CAREFULLY DRAWN.

If the Court should decide to issue preliminary injunctive relief, its order should be limited to maintaining the status quo, consistent with the D.C. Circuit's decision, by enjoining only the addition of new employee groups that do not share a common bond with a credit unions' core field of membership. The proposed orders submitted by plaintiffs go much further and would cause unnecessary harm to credit unions.[9]

[9] NCUA is submitting with this memorandum a model preliminary injunction for the Court to consider **if it rejects NCUA's other arguments for why injunctive relief should not be issued at all.** NCUA is **NOT** asking the Court to issue this preliminary injunction, and NCUA reserves its right to appeal if

A. Plaintiffs' Proposed Injunction Against New Groups

With regard to the addition of new groups, plaintiffs want the Court to enjoin NCUA from "approving amendments to occupational federal credit union charters that would allow credit unions to offer membership or services to occupational groups whose members share no common bond of occupation with all other members of the credit union; . . ." Proposed Preliminary Injunction at 2.[10]

Such an order would unnecessarily prevent NCUA from approving the addition of <u>any</u> new employee group to the 3,586

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this or any other injunction is issued. Indeed, NCUA's position is that injunctive relief is not appropriate, and it is submitting a proposed order for the Court to enter denying plaintiffs' motion for a preliminary injunction. However, if the Court determines that some relief should be awarded, then it should consider the model preliminary injunction being submitted in conjunction with NCUA's arguments as to why plaintiffs' proposed order is overbroad. The model injunction contains a termination date of April 1, 1997 (extendable by the Court), to allow adequate time for the parties to submit, and for the Court to consider, additional evidence concerning the relative harms necessary to support a final determination on the merits.

[10] In support of their request for an injunction prohibiting NCUA from approving new groups under the policy, plaintiffs relied at the October 9 hearing upon a chart listing 38 credit unions for which NCUA approved membership expansions in August, 1996. Plaintiffs contend that the total membership of the added groups -- 76,420 -- demonstrates the competitive injury to banks. However, that number merely represents the individuals in those groups <u>eligible</u> to join a credit union; it does not mean they have actually done so. Indeed, as of October 11, 1996, only 1,580 of the 76,420 employees in those groups had joined a credit

credit unions containing multiple groups, even if the new group shared a common bond with the credit union's core membership. For example, assume that a credit union consists of two unrelated groups, Company A (the core group) and Company C. Company A then buys Company B, which remains a separate subsidiary. As the D.C. Circuit explained: "Joint ownership of Companies A and B creates a common bond extending across the two groups; the employees of Company B could then become members of the FCU at Company A." 90 F.3d at 528.

Under plaintiffs' proposed injunction, however, the employees of Company B would not be able to join the credit union, notwithstanding their common bond with Company A, because they do not also share a common bond with Company C. Such a result is inconsistent with the D.C. Circuit's decision, which clearly permits the addition of new groups sharing a common bond with the credit union's core membership. Plaintiffs' proposed injunction is therefore overbroad and would cause even greater harm to credit unions by eliminating the limited opportunity for membership growth left open under the Court of Appeals' reasoning.

Accordingly, any injunction against the approval of new employee groups should preserve NCUA's ability to approve the

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union. See Declaration of John K. Ianno (filed October 24, 1996).

addition of a new group when, in its judgment, a common bond exists between that group and the credit union's core membership. For example, the model preliminary injunction submitted by NCUA would specifically enjoin NCUA from approving charter amendments pursuant to the multiple group policy, thereby allowing it to approve such amendments on other grounds. See n.9, supra.

B. Plaintiffs' Proposed Injunction Against New Members.

Plaintiffs' also ask the Court to order NCUA "to advise all federal credit unions that they may not enroll new members who do not share a common occupational bond with all the other members of the credit union." Proposed Preliminary Injunction at 2.

The effect of such an order would be to prevent any multi-group credit union from accepting any new members, whether from its core membership group or from other groups added previously. To use the previous example, employees of affiliated Companies A and B would no longer be permitted to join the Company A credit union under the proposed injunction, because they would not "share a common occupational bond with all the other members of the credit union," Proposed Preliminary Injunction (emphasis added). Specifically, they would not share a common bond with the credit union members employed by Company C, an unrelated employee group. Employees of Company C would similarly be barred from joining, because they would not share a common bond with the credit union members employed by Companies A and B.

In other words, if a credit union has even just one member who does not share a common bond with all of the other members, then no one would be permitted to join the credit union under plaintiffs' proposed injunction, because nobody could share a common bond with "all the other members of the credit union." Thus, the proposed injunction against new members would bar every one of the 3,586 credit unions containing multiple groups from accepting any new members at all.

Although plaintiffs characterize this result as maintaining the "status quo," their proposed injunction against new members would in fact drastically alter the status quo by effectively divesting the approximately 157,000 employee groups previously approved by NCUA for credit union membership. Indeed, the only way that NCUA could prevent credit unions from enrolling new members is by revoking its prior approval of all 157,000 employee groups.[11] As a result, these employers would no longer be able to offer credit union membership to their new employees, and

[11] Although NCUA could "advise" federal credit unions not to enroll new members, as provided in the proposed preliminary injunction, this by itself would impose no legal obligation on the credit unions. Federal credit unions are legally entitled to enroll new members from their employee groups by virtue of NCUA's approval of their past membership expansions.

current employees who had not already become credit union members would immediately lose their right to do so. This will seriously harm credit unions by causing many of their employee groups to withdraw their credit union support. See Second Marquis Decl. ¶ 6. This concrete harm to credit unions and their employee groups far outweighs whatever competitive advantage the banking industry might hope to gain by preventing credit unions from enrolling new members.

Moreover, even if plaintiffs' challenge to the multiple group policy itself is not barred by laches, thereby permitting an injunction against its further implementation, an injunction directed at groups previously approved by NCUA would be barred by laches. In other words, even if the Court were to reject the credit unions' reliance upon the multiple group policy as a basis for laches, there remains the issue of the credit unions' reliance upon the groups already added to their fields of membership under the policy. NCUA's approval of those groups has never previously been challenged by the banks, and the resulting reliance of credit unions on those groups bars the banks from challenging them now. If the Court, in addition to enjoining the approval of new groups, also prevents credit unions from enrolling new members from their existing groups, it will largely deprive them of the ability to enroll any new members at all. See, e.g., Declaration of Patricia White (filed October 9, 1996)

¶ 6 (80% of Family 1 FCU's membership is derived from groups added under the multiple group policy).

Plaintiffs' proposed injunction against new members is also overbroad in three important respects. First, it would prevent multiple-group credit unions from accepting new members from their core membership group, even though the addition of such members is certainly permitted by the Court of Appeals' decision and, under its analysis, does not even raise a "common bond" issue. See 90 F.3d at 528 ("it is tautological to say that a single group has a common bond . . .").

Second, the proposed injunction would prevent credit unions from accepting new members from those groups which do share a common bond with the core membership. Plaintiffs apparently assume that employee groups approved under the multiple-group policy do not share a common bond with the credit union's core membership. But that is not necessarily the case. Although the policy does not require that a common bond be shown, one may nevertheless exist. To use the Court of Appeals' example once again, if Company A buys Company B, then the joint ownership creates a common bond between the two groups, enabling Company B to become part of the field of membership of the Company A credit union. Although NCUA would have approved Company B's addition to the credit union pursuant to its multiple group policy, it nevertheless shares a common bond, and therefore it should not be prevented from adding new members to the credit union.

Third, the proposed injunction would encompass groups approved by NCUA more than six years before the case was filed, which is beyond the applicable statute of limitations, 28 U.S.C. § 2401(a). Because the statute of limitations bars plaintiffs from challenging groups added more than six years ago, those groups also should not be prevented from adding new members to a credit union.

Any attempt to cure this overbreadth raises serious problems of implementation. As of September 23, 1996, there were 3,586 federal credit unions containing at least 156,999 employee groups. Administering the proposed injunction in a way that would permit appropriate groups to continue adding members would require NCUA to examine every one of these groups to determine (a) whether it shares a common bond with the credit union's core membership group, and (b) whether its approval occurred beyond the limitations period, i.e., more than six years before the case was filed. This would be an extremely difficult and time-consuming task, and the burden it would impose on NCUA is an additional reason why the proposed injunction against new credit union members should not be granted.

If, despite these considerations, the Court decides to issue plaintiffs' proposed injunction against new members from groups previously approved by NCUA, it should give NCUA at least 90 days to develop standards and procedures for implementing it, and a status conference should be held before the injunction becomes effective in order to clarify NCUA's responsibilities.

IV. THE COURT SHOULD NOT ISSUE A PRELIMINARY INJUNCTION WITHOUT REQUIRING PLAINTIFFS TO POST A BOND.

When a federal court grants injunctive relief, it generally must require the party seeking relief to provide security for any damages that may be incurred by a party found to have been wrongly enjoined. Fed. R. Civ. P. 65(c). The interests of intervening parties may be protected in this fashion. See Alabama v. U.S.E.P.A., 925 F.2d 385, 391 (11th Cir. 1991). The potential injury here that would require plaintiffs to post a bond are the losses to the National Credit Union Share Insurance Fund from any credit union insolvencies caused by an injunction.

As NCUA has explained, the requested injunction would likely increase credit union failures and the corresponding cost to the Insurance Fund by preventing credit unions from expanding and diversifying their assets through the addition of new employee groups. In just one region encompassing 10 states, NCUA has identified at least nine credit unions with 70,200 members and $343 million in total assets that must diversify their membership base immediately in order to survive. Hornbrook Decl. ¶ 4. The total assets of all federal credit unions containing select employee groups is $150 billion. Second Marquis Decl. ¶ 5.

The Insurance Fund is ultimately guaranteed by the United States government, but it is financed by the insured credit unions themselves, who will have to make up any losses to the Fund caused by the requested injunction. While the timing and extent of such losses cannot be predicted, the evidence submitted establishes the likelihood that such losses will occur and that they will be substantial. Accordingly, if an injunction is issued, plaintiffs should be required to provide security in the amount of $1,000,000, to be increased if necessary upon submission by NCUA of appropriate additional evidence.

CONCLUSION

For the reasons stated above and in defendants previous memorandum, plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted,

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